Comcast Cablevision of Philadelphia, L.P. *and* Teamsters Union Local No. 115, affiliated with the International Brotherhood of Teamsters, AFL–CIO. Cases 4–CA–19155, 4–CA–19451, 4–CA–19569, and 4–RC–17321

May 24, 1999

SUPPLEMENTAL DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On November 23, 1993, the National Labor Relations Board issued a Decision and Order[1] in this proceeding finding that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act. The violations, which occurred both before and after a Board-conducted election, included interrogation, grant of a wage increase, promises of benefits, and discharges. Because of the severity of the unfair labor practices, the Board found that a bargaining order was appropriate under the test set forth in *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969).

The Respondent filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit. In an unpublished decision of February 7, 1995,[2] the court enforced the Board's unfair labor practice findings, but remanded the case to the Board solely for consideration of evidence bearing on the propriety of the bargaining order and for consideration of other remedies that would be adequate to erase the effects of the unfair labor practices and to ensure a fair rerun election.

On May 11, 1995, the Board advised the parties that it had decided to accept the court's remand and invited statements of position. Thereafter, the General Counsel, the Union, and the Respondent filed statements of position. On July 26, 1995, the Board remanded the case for a hearing before an administrative law judge to allow the parties to present relevant evidence in light of the court's opinion.

On January 19, 1996, Administrative Law Judge Thomas R. Wilks issued the attached supplemental decision, which recommended that the *Gissel* bargaining order be withdrawn. The judge also recommended denying the Union's alternative request for special remedies in lieu of a bargaining order.

The General Counsel and the Union each filed exceptions and supporting briefs. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered its original decision, the judge's supplemental decision, and the record in light of the court's remand, which the Board accepts as the law of the case, and the parties' statements of position, exceptions, and briefs, and has decided to affirm the judge's rulings, findings, and conclusions as modified, and to adopt his recommended Order as modified herein.

We agree with the judge that, in light of the court's remand, the *Gissel* bargaining order should be withdrawn and a second election held.[3] We recognize, particularly given the Board's long and unjustified delay in processing the case, that a *Gissel* bargaining order likely would be unenforceable. Rather than engender further litigation and delay over the propriety of a bargaining order, we believe that employee rights would better be served by proceeding directly to a second election.[4]

Although a *Gissel* remedy is not being imposed, we do find that an additional remedy is warranted in order to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices, and to ensure that a fair election can be held.[5] Specifically, we shall order the Respondent to supply to the Union, on a request made within 1 year of the date of this Supplemental Decision, Order, and Direction of Second Election, the names and addresses of all current unit employees. The delay in this case, although unfortunate, was no more the fault of the Union or of the employees who were denied a fair opportunity to choose whether they desire union representation than it was of the Respondent. Our Order will afford the Union "an opportunity to participate in [the] restoration and reassurance of employee rights by engaging in further organizational efforts, if it so chooses, in an atmosphere free of further restraint and coercion." *United Dairy Farmers Cooperative Assn.,* 242 NLRB 1026, 1029 (1979), enfd. in relevant part 633 F.2d 1054 (3d Cir. 1980).[6]

Contrary to the judge, a determination that a *Gissel* bargaining order is not warranted under the circum-

[1] 313 NLRB 220.

[2] No. 93–1828.

[3] In light of our decision not to issue a *Gissel* bargaining order, the Respondent's motion to admit newly available evidence on the increase in turnover in the bargaining unit is denied as moot.

[4] Although we have accepted the court's remand as the law of the case here, we note that the Board traditionally assesses the validity of a bargaining order based on an evaluation of the situation as of the time the unfair labor practices were committed. *Salvation Army Residence*, 293 NLRB 944, 945 (1989), enfd. mem. 923 F.2d 846 (2d Cir. 1990). Historically, the Board has not considered subsequent employee or managerial turnover in this context. *Highland Plastics, Inc.,* 256 NLRB 146, 147 (1981).

[5] It is well settled that the Board has broad discretion when fashioning a "just" remedy. *Maramount Corp.,* 317 NLRB 1035, 1037 (1995).

[6] The Board has previously ordered this remedy in cases where it found that remedial measures in addition to the traditional remedies for unfair labor practices were appropriate. See, e.g., *Montfort of Colorado*, 298 NLRB 73, 86 (1990), enfd. in relevant part 965 F.2d 1538 (10th Cir. 1992); *United Dairy Farmers Cooperative Assn.,* 242 NLRB at 1030; *Haddon House Food Products,* 242 NLRB 1057, 1059 (1979), enfd. in relevant part sub nom. *Teamsters Local 115 v. NLRB*, 640 F.2d 392 (D.C. Cir. 1981); and *Loray Corp.*, 184 NLRB 557, 559 (1970).

This remedy is in addition to the Union's right to have access to a list of voters and their addresses under *Excelsior Underwear*, 156 NLRB 1236 (1966), after issuance of the Notice of Second Election.

stances of this case is not dispositive of the issue whether to provide other special remedies. The Board certainly has the discretion to decline to issue a bargaining order while granting other remedies. Indeed, the District of Columbia Circuit Court of Appeals has specifically directed the Board on remand to consider separately "whether other remedies would be adequate to erase the effects of the past unfair labor practices and to ensure a fair rerun election at Comcast." In concluding that a bargaining order was not warranted, the judge, under his view of the court's remand, gave preeminent consideration "to the infringement of the representational rights of subsequent unit majority newcomers." That concern is, however, not undermined by our grant of an additional remedy before a second election.

Rather, this remedy "aid[s] in creating an atmosphere free of restraint and coercion so that [the Board] will be able to conduct a new election in which [it] can place some confidence." *United Dairy Farmers*, 242 NLRB at 1029. To afford a just remedy, the Board has granted special access and notices remedies in cases where a bargaining order would have issued, but for the union's lack of majority support. *United Dairy Farmers*, supra. Such remedies are a fortiori within the range of our remedial discretion when seeking to assure a fair second election for a bargaining unit in which the Union at one time enjoyed majority support but which was destroyed by serious unfair labor practices (e.g., unlawful grant of extraordinary wage increase and unlawful discharge of six employees) which are likely to have lingering effects. In sum, we hold that the Board can decline to issue a bargaining order while granting other remedies. We further conclude, in response to the court's second inquiry on remand, that a fair second election is possible here, but only with the grant of an additional remedy to erase the lingering effects of the Respondent's unfair labor practices.

We emphasize that our decision is limited to the specific procedural and factual circumstances presented in this case. Accordingly, we shall delete the bargaining order from our original Order, reopen the representation proceeding, and direct that a second election be held.[7]

ORDER

The National Labor Relations Board orders that paragraph 2(a) be deleted from the Board's Decision and Order reported at 313 NLRB 220 (1993).

IT IS FURTHER ORDERED that the Respondent supply the Union, on request made within 1 year of the date of this Supplemental Decision, Order, and Direction of Second Election, the full names and addresses of its current unit employees.

IT IS FURTHER ORDERED that Case 4–RC–17321 is reopened and that all prior proceedings held thereunder be reinstated.

IT IS FURTHER ORDERED that Case 4–RC–17321 is severed and remanded to the Regional Director for Region 4 for the purpose of conducting a new election.

[Direction of Second Election omitted from publication.]

MEMBER BRAME, concurring in part and dissenting in part.

For the reasons given by the judge, I also would find that a *Gissel* bargaining order is no longer warranted in the circumstances present here.[1] Further, and based on an independent analysis of whether special remedies are warranted here, I conclude that the same factors which the judge found militate against the issuance of a *Gissel* bargaining order, i.e., the substantial passage of time since the 1990 election, the high turnover of employees in the bargaining unit since the election, and changes in management, also militate against giving any of the special alternative remedies requested by the Union. In sum, given that the election was almost a decade ago, that most of the bargaining unit employees who were in the bargaining unit when the violations occurred have departed, and that many of the management officials who were responsible for the unfair labor practices have also left, I do not find, contrary to my colleagues, that any alternative remedy is necessary "to dissipate . . . any lingering effects" of the Respondent's unfair labor practices or to ensure that a fair election can be held. Finally, in reaching the conclusion that no special alternative remedy is warranted, I emphasize that, as found by the judge, neither the General Counsel nor the Charging Party presented any evidence of recidivism or noncompliance by the Respondent with the court's order in this case or any evidence that the Board's traditional remedies are inadequate. With the judge, I would find the case for special remedies "untenable."

Richard Wainstein, Esq., for the General Counsel.
Richard C. Hotvedt, Esq. and *John Mills Barr, Esq. (Morgan, Lewis and Bocius),* of Washington, D.C. for the Employer.
Norton H. Brainard, III, Esq., of Philadelphia, Pennsylvania, for the Charging Party.

SUPPLEMENTAL DECISION AND ORDER ON REMAND

THOMAS R. WILKS, Administrative Law Judge. On November 23, 1993, the Board, with very minor modification, adopted the decision of Administrative Law Judge David L. Evans of December 28, 1992 (313 NLRB 220), which included the Judge's recommended bargaining order sought by the Charging Party pursuant to *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

On petition to review, the United States Court of Appeals for the District of Columbia Circuit issued a judgment on February 7, 1995, which sustained the Board's finding of unfair labor practice violations and granted enforcement of the Board's

[7] It is not necessary to reaffirm our prior Order because, as noted above, the court of appeals, except for the bargaining order provision, enforced it in all respects.

[1] *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

remedial order. However, with respect to the requested bargaining order, the court stated:

> [T]he Board failed to provide a reasoned justification for the order. In particular, the Board failed to consider (1) whether or not there was employee turnover at Comcast and, if so, what effect such turnover would have on the appropriateness of a bargaining order; and (2) whether other remedies would be adequate to erase the effects of the past unfair labor practices and to ensure a fair rerun election at Comcast. See *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1171, 1175–1176 (D.C. Cir. 1993), cert. denied 511 U.S. 1003 (1994); *Somerset Welding & Steel v. NLRB*, 987 F.2d 777, 781–782 (D.C. Cir. 1993), id. at 782 (Edwards, J., concurring in the judgment); *Avecor, Inc. v. NLRB*, 931 F.2d 924, 936–938 (D.C. Cir. 1991), cert. denied, 502 U.S. 1048 (1992). The Court remands this case to the Board to reconsider the bargaining order issue and to make any necessary findings with respect thereto. [Unpublished, 48 F.3d 562, 1995; 1995 WL66744 (D.C. Cir.).]

On May 11, 1995, the Board advised the parties that it had decided to accept the court's remand and solicited their statements of position, which subsequently it received.

On July 26, 1995, a three-member panel of the Board issued an Order remanding the proceeding to Judge Evans "for the limited purpose of reopening the record to receive evidence regarding employee turnover and other issues raised by the General Counsel at page six of his statement of position and of determining whether traditional remedies are adequate to ensure a fair second election. See *Impact Industries*, 293 NLRB 794 (1989)."

The factual issues suggested by the General Counsel as relevant areas of remand inquiry are listed on page 6 of his position statement as follows:

> (a) The continuing presence of, or announced promotions for, supervisors and managers who were involved in or who directly committed the unfair labor practices.
>
> (b) Subsequent wage adjustments and wage increases. General Counsel has reason to believe that, notwithstanding Respondent's announcement in 1989 that wages would be reviewed annually (see ALJD slip op. at p. 61, lines 5–13), there were no wage adjustments in 1991, 1992, or 1994. The absence of such "expected" annual adjustments would naturally magnify the continuing coercive effect of the extraordinary, and unlawful, 1990 wage adjustment.
>
> (c) Subsequent layoffs. General Counsel has reason to believe that since the unlawful "layoffs" of the seven lead union adherents in January and February 1991, there have been few layoffs of unit employees, or none at all. If so, then the dramatic retaliatory terminations would likely have a stronger continuing impact on employee free choice.

On August 4, 1995, the Board issued an amended order which permitted the remanded hearing to be assigned to any judge designated by the chief administrative law judge. Subsequently, I received that assignment and on August 14, 1995, conducted a joint telephone conference with the parties' counsel during which certain agreements were reached, i.e., the method and manner of adducing documentary evidence and limited explanatory testimonial evidence as well as the date of a hearing. Accordingly, on August 17, 1995, I issued a notice of remand hearing to be held on the mutually agreed-upon date of September 19, 1995.

The hearing opened before me on September 19 and concluded the same day. Undisputed documentary evidence was adduced by the parties which, to some extent, was explained or elaborated upon by testimony of Respondent witnesses. At the hearing, I granted Respondent's petition to revoke a subpoena duces tecum served upon it by the Charging Party. I ruled that the materials sought by the Charging Party were not related to the issues before me as framed by the Board's remand order, i.e., "evidence regarding employee turnover and the issues raised on page six of the General Counsel's position statement." The General Counsel took no position. The Charging Party's request for leave to appeal my ruling during the hearing was refused, but rather Charging Party was instructed to file his request for permission to appeal with the Board after the hearing closed but before briefs were filed with me.

The Charging Party filed its appeal with the Board by way of motion dated October 5, 1995, a copy of which was received by the Division of Judges on October 12, 1995. Respondent's hand-delivered opposition to the appeal was filed on October 18, 1995. On December 18, 1995, the Board denied the appeal.

Posttrial written briefs were submitted by all parties on or about October 25, 1995. I received the General Counsel's motion to strike portions of Respondent's brief. That motion, dated November 2, objected to parts of Respondent's brief which, the General Counsel argued, attempted to improperly affect notice by the administrative law judge of alleged facts not contained in the record as adduced at the hearing before me; i.e., the extent of Respondent's compliance with the enforced Board order which the General Counsel conceded was "for the most part correct" as set forth in Respondent's brief, and Respondent's "spotless record on labor relations since February 1991." On November 20, the Division of Judges was served with Respondent's opposition to that motion. Therein, Respondent argued the well-established principle that an administrative agency may take notice of its own records and decisions. The discussion of those motions is set forth in the analysis section of this decision.

The briefs submitted by the parties consisted of a lengthy, detailed analysis of documentary evidence with only minor variations and also recitation of unrefuted testimony. Accordingly, I have treated those briefs as proposed findings of fact and conclusions to which little more can be added, save for some reconciliation of those minor variations. Accordingly, with respect to the findings of fact herein, I have a accepted portions of same as is, or with modifications, as my findings of facts, all however, dependent upon my own evaluation of the evidence.

Based on the Board's remand order, the record adduced at the hearing and briefs submitted, I make the following

I. FINDINGS OF FACT

A. Background

The evidence as to the state of Respondent's unit employee turnover adduced at the remand hearing, as with other data, was as of the most recent available date preceding the hearing. This is in accord with the circuit court's view that the Board must consider unit employee turnover up to the time it issues its recommended remedial order on remand. See *Somerset Welding & Steel v. NLRB*, supra, and *Avecor, Inc. v. NLRB*, supra. The

parties referenced that data to the critical stages involved in the underlying proceeding. Those events involved the following sequential events: (1) The commencement of union organizing in September 1989, during which 65 of 66 union representation designations were signed by employees between October 29, 1989, and March 22, 1990. One designation was signed on April 19, 1990; (2) the unlawful prohibition of union buttons in the plant in March 1990; (3) the filing of an election petition by the Union on March 22, 1990; (4) unlawful acceleration of merit wage reviews and unlawful wage increases of May 29, 1990; (5) unlawful promise of workboots to a group of employees in June or July 1990; (6) the Regional Director issued a Decision and Direction of Election on July 13, 1990; (7) from mid-July 1990 to the first few days of August 1990, the Respondent engaged in nine other incidents of employee coercion, including one promise of benefit to one employee, and eight incidents of interrogations of individual employees found by the judge to be coercive; e.g., as to why they supported the Union and how they would vote in the impending Board-conducted election. Some of those employee voters included self-identified union supporters;[1] (8) on August 3, 1990, unit employees are granted a direct payroll deposit benefit in an unlawful attempt to influence their vote in the scheduled Board-conducted election; (9) the election is conducted on August 10, 1990, at which 44 unit employees voted for the Union and 46 against it, with no challenged ballots. The so-called "*Excelsior* list," i.e., the election list of eligible voters, indicates 95 persons; (10) the January 7, 1991 unlawful discriminatory layoff of one bench technician, a unit employee; and (11) the discriminatory, unlawful layoff of six construction technicians. The administrative law judge found that the Respondent was in part motivated by a desire to reduce the prounion votes in an expected rerun election.

The parties in their briefs have referenced the varying status of the data adduced at trial to the dates argued by the General Counsel to be the most significant events, i.e., the May 29, 1990 wage increase, the August 10, 1990 election, and the February 8, 1991 unlawful layoffs.

B. Employee Turnover

The size of the unit has almost halved since the 1990 election. There are currently only 50 unit employees.[2] The nature of Respondent's business has changed somewhat due to the fact that it has completed the raw installation involved in the early days of area cable construction. Now the Respondent is oriented toward maintenance rather than trenching and cable installation. However, the advent of fiber optic cable usage may involve a form of installation, but of a significant different nature and which does not involve direct connection to the ultimate consumer, at least in the foreseeable future. Because of the different emphasis in its operations, Respondent now no longer maintains several unit classifications related to construction installation work, including installers and lead installers, of whom there were 21 and 2, 1990 unit employees, and construction technicians and lead construction technician, of whom there were 6 and 1, 1990 employees, respectively, as well as the bench technician position. Thus the discriminatees' former positions have been eliminated for economic reasons. They are not now employed within the unit, and there is no allegation or argument that their current nonemployment within the unit is due to a failure of compliance by Respondent with the Board's enforced order.

The record reveals that with respect to the 50 current unit employees, the following number of them were employed on the critical dates:

1. May 29,1990 wage increase—22 in the unit
2. August 10,1990 election—23 in the unit and 1 as a first-line supervisor who had been promoted before the election but who did not return to the unit until November 1993.
3. February 8, 1991—23 in the unit, 3 as first line supervisors and 1 as a nonunit dispatcher

Of the 50 current unit employees, 23 commenced employment with the Respondent's Philadelphia system after the February 8, 1991, layoffs. A 24th employee commenced work as a nonunit dispatcher and first transferred to the unit in January 1992. The hiring pattern of the current unit employees breaks down as follows:

1 since 1986
5 since 1987
6 since 1988
7 since 1989
9 since 1990
4 since 1992
7 since 1993
2 since 1994
5 since 1995

Of the 50 current unit employees, only 17 executed written union representation designations according to the original record. See also 313 NLRB at 257.

C. Continuity of Supervisors/Managers

The following is the status of 15 supervisors/managers involved in the events underlying the unfair labor practices.

1. *Tyrone T. Connor*: from April 1990, vice president of Comcast's Philadelphia area operations, passed away on December 24, 1994.

2. *Michael Doyle*: senior regional vice president for Comcast's Northeast Region; acting area vice president 1989 through April 1990. Michael Adderly assumed that office on March 14, 1990.

3. *Paul Gillert*: currently employed by Comcast Corporation as the senior corporate vice president for human resources.

4. *Don Brandt*: technical supervisor of Comcast's Northeast Avenue facility, left Comcast's employment on February 28, 1991.

5. *Randy Cicatello*: area technical operations manager, left Comcast's employment on August 19, 1994.

6. *Barbara A. Cummins*: customer service manager, left Comcast's employment on April 17, 1995.

7. *Michelle Davis*: dispatch supervisor, left Comcast's employment on April 8, 1991.

8. *John Donahue*: area director of engineering, was promoted to the regional director of engineering on August 27, 1990.

[1] The Board relied only on interrogations of employees who were not known to be union supporters and found it unnecessary to pass on the judge's other findings of unlawful interrogation of known union supporters.

[2] On the date of the election petition filing on March 22, there were 92 unit employees. At the time of the August election, there were 95 eligible employee voters.

9. *Michael Duncan*: then and currently employed by Comcast as a construction supervisor.

10. *Lynn Green*: human resources manager, N.E. Avenue, left Comcast's employment on June 24, 1991.

11. *Jeff Harris*: training manager, N.E. Avenue, left Comcast's employment on January 8, 1995.

12. *Paul Rawls*: still currently employed by Comcast as a technical operations manager.

13. *Jeff Tucker*: construction supervisor, left Comcast's employment on July 19, 1991.

14. *Al Calhoun*: exact status then unclear, later projects coordinator, September 25, 1993.

15. *Willie D. Kelley*: director of human resources, left Comcast's employment on July 28, 1995.

Shortly after the filing of the election petition, Respondent hired an independent labor relations consultant, Al Peddrick, who worked with Gillert to direct Respondent's election campaign activities. Peddrick conducted supervisory meetings at which he solicited supervisors' estimates as to the number and identity of likely prounion voters. In November 1993, he was hired by Respondent and he currently serves as its cable division director of human resources. Current Area Vice President Adderly testified that any ongoing union activity known to him must be reported to Peddrick. There are no unfair labor practices attributed to Peddrick and none in which he is proven to be involved in 1990 or indeed later.

Judge Evans found that Respondent gave strict instructions to its supervisors not to threaten or interrogate employees or to engage in "other such violative conduct." He found that to be an "ameliorative," but not controlling, factor. He concluded that for a variety of reasons, supervisors do not always follow such instructions. Judge Evans concluded that such meetings, as were conducted by Peddrick, create "the possibility that supervisors would feel pressured to contribute information even if they had also been told not to conduct outright questioning." He also concluded that Supervisor Green simply misunderstood instructions.

Of the 12 incidents of independent 8(a)(1) violative conduct found by Judge Evans, there were 8 incidents of individual interrogations. Of the eight interrogators, only Rawls and Duncan remain. Connor, the promiser of the boot benefit, is gone. Connor and Cicatello, the promisers of promotion to one employee, are gone. Of the two separate instances of supervisors' prohibition of union buttons, Brandt is gone but Donahue was promoted out of the immediate area but to a higher level of management.

With respect to the victims of interrogations, only one, Dondell Jett, is still employed in the unit. At least one employee of the small group of employees promised workboots is gone, i.e., discriminatee Gardner. Employee Heath, a known union activist who was interrogated by Connor, promised a promotion by Cicatello and who was a union button prohibition victim, was promoted out of the unit. Employees Laurence and J. Johnson, who were among a small group of employees subjected to Brandt's union button prohibition, are also not employed in the unit.

In addition to the foregoing involvement, Donahue was also involved with Gillert and Doyle with respect to the inordinate pay raise given to some of the unit employees on May 29, 1990, which Judge Evans found to be an unlawful vote-buying stratagem, and were involved with respect to the unlawful layoff decisions (along with Connor). Gillert's involvement with the layoff decisions was less direct than with the unlawful pay raise implementation. Donahue and Doyle were more directly and actively involved. Doyle remains regional vice president for Respondent's entire Northeast Region as he was in 1990 when he also held the dual capacity as acting vice president until Connor was hired in April.

Respondent adduced testimony from current Area Manager Adderly, which it characterizes as evidence of day-to-day, autonomous, local Philadelphia area operations to which Doyle and Gillert are only remotely involved. Adderly testified that he now possesses the ultimate authority for all hiring, promotion and terminations decisions in the Philadelphia system for which he is generally responsible. However, he admittedly reports to Doyle. He described Doyle as having regional responsibility for Philadelphia and a dozen other systems in New Jersey. He described Doyle as having also the primary duty "to set strategic direction for approximately one million customers" of a total Respondent customer base of 3-1/2 million customers. Doyle reports directly to Tom Baxter, the president of the cable division, of which the headquarters are located in Philadelphia. Adderly testified that Gillert represents the corporate organizations and has responsibility for the cable division, the QVC division, the cellular division, and the corporate office. Peddrick also reports directly to Baxter. Calhoun and Donahue both report directly to Doyle. According to Adderly, Donahue's function as vice president of engineering is to devise a sound engineering platform for the cable systems to operate under the process or rebuilding with fiber optic cable and to direct its implementation. His only contact with the area operation is to relay information as to what platform and converter boxes are to be used. Adderly testified that since his promotion in March 1995, he has had little or no operational contact with Doyle, Gillert, or Peddrick.

In addition to Adderly, Respondent has installed other new managers at the Philadelphia system. As of November 26, 1990, Sanford Ames Jr. transferred there and later became general manager in 1993–1994. He is responsible for day-to-day operational decisions. Jane Yager has been the new human resources director for 6-1/2 months of six supervisory persons who report directly to Adderly and who have some relation to the unit. Only the accounting manager remains.

D. Subsequent Wage Adjustments and Wage Increases

Judge Evans found that the announcement of wage increase implementation was not unlawful. Rather, he found that excessive raises of double or triple what would otherwise have been expected by employees based on 1989 raises and Respondent's wage program were given in 1990 to employees in the most populous unit classifications. In 1989, unit employees received a 5.1 percent (or less) raise). Judge Evans found: "In 1990, line technicians and construction technicians received 11.6 and 14.8 percent respectively and service technicians, the most populous unit classification, received 15.5 percent." 313 NLRB at 248. The judge also found that the average 1990 wage increase for all Philadelphia system employees was 8.2 percent. The unlawful wage increases were wage "adjustments." Respondent also had a practice of granting individual "merit' increases. From 1991 to 1995, the Respondent granted wage adjustments in only 2 years, 1993 and 1995. At the remand hearing, Adderly testified that Respondent has no plans for wage adjustments in the "foreseeable future." As the following chart reveals, both

types of total wage increases have averaged out at relatively moderate levels for both unit and nonunit employees.

Average Increase by Year

	1991/%	1992/%*	1993/%	1994/%*	1995/%
Unit	6.0	4.9	6.7	3.0	1.9
Nonunit	4.9	4.7	7.9	2.9	2.8
Combined	5.3	4.8	7.4	3.0	2.6

*Years marked with an asterisk represent years that included a wage adjustment. The average increases for 1995 represent average increases only for those employees who actually received a raise.

In 1993 and 1995, unit employees received an average wage adjustment of 2.7 percent and 9 percent, respectively. The following chart sets forth the 1990 raises for those 22 current unit employees who were then employed in the unit. The General Counsel stresses that for those seven employees designated by an asterisk, it was their largest, single nonpromotion wage increase in their work history for the Respondent. Four of those designated by a double asterisk received their highest subsequent raise because of promotions from service technicians to line technician positions. Also listed, as cited by Respondent, are the highest subsequent raises for merit, wage adjustment, or promotions for those 1990 employees who had received an 11 percent or higher raise in 1990, i.e., the range found excessive by Judge Evans. Also included are subsequent raises for two employees who received lower 1990 raises but who were in the category of employees receiving excessive raises.

	1990% Wage Adjustments	Comparable or Higher, Single, Largest Subsequent Raises
Elwell	4.3 $8.15 to $8.50 ($.35)	
Ryekoto	7.5 $6.85 to $7.20 ($.55)	
Lacey*	15.9 $7.20 to $8.35 ($1.15)	8%–6/21/93
Lopez*	15.9 $7.20 to $8.35 ($1.15)	7%–6/21/93
Santana[3]	15.1 $8.12 to $9.35 ($1.23)	44%–11/05/90
Carrion**	14.9 $7.48 to $8.60 ($1.12)	16.9%–3/28/94
Chaszczewicz	7.5 $6.65 to $7.15 ($.50)	7%–10/09/91
Baselice*	19.5 $9.20 to $11 ($1.80)	
Blair**	15.9 $7.20 to $8.35 ($1.15)	13%–6/13/93
Defabis		
McCloskey	4.4 $7.95 to $8.30 ($.35)	
Mazzone**	12.7 $7.94 to $8.95 ($1.01)	17%–3/16/93
Negron**	9.0 $7.66 to $8.35 ($.69)	14.9%–6/01/95
Staszak	15.9 $7.20 to $8.35 ($1.15)	12.5%–7/17/95
Anderson	7.5 $6.65 to $7.15 ($.50)	
Evans	7.5 $6.65 to $7.15 ($.50)	
Jett	13.2 $8.26 to $9.35 ($1.09)	
Monaghan	10.7 $6.65 to $7.36 ($.71)	
Richardson	4.0 $7.45 to $7.75 ($.30)	
Ruiz	10.5 $6.65 to $7.35 ($.70)	
White	10.5 $6.65 to $7.35 ($.70)	6%–7/03/95
Payne	19.9 $7.80 to $9.35 ($.70)	

[3] Santana was promoted to Service Supervisor on 11/05/90. On 12/30/92, he transferred to Lead Service Technician with a 5-percent reduction in pay.

Subsequent to May 1990, each of the foregoing May 1990 unit employees have received subsequent raises of at least 8 percent for merit, adjustments, or promotions. Of those 22 employees (except Elwell who was apparently demoted by September 1995), 17 had increased their annual wages by substantially more than 50 percent of their May 29 adjusted wages. The remaining four had increased their annual wages by somewhat less but close to 50 percent.

The General Counsel also cites as a lingering factor the May 1990 acceleration of merit wage reviews and the unlawful August implementation of the direct deposit benefit.

E. Subsequent Layoffs

Respondent laid off no unit employee since it discriminatorily laid off the seven leading union adherents in January and February 1991. Since January 1990, it had laid off only one other unit employee. Respondent's entire organization has employed about 1050 individuals since January 1, 1990. About 690 of those individuals are no longer employed. Among those 690 terminations, of which 188 were involuntary, there have been only 13 layoffs (not counting the unlawful terminations of the 7 union adherents involved in the instant proceedings). Of those 13 layoffs, at least 6 appear to have been supervisors or managers. Within the unit, there were 55 involuntary terminations. From August 11, 1990, to June 30, 1991, there were 51 involuntary separations in the entire system, including 17 involuntary separations in the unit and excluding the discriminates.

At the time Respondent unlawfully terminated the bench technician and construction technicians in early 1991, it was also planning to contract out its installation work. 313 NLRB at 242. There were 21 installers and 2 lead installers in May 1991. There are none today. No other installers were laid off. Instead, a number of installers transferred to other positions in Respondent's engineering department.

In 1990, Respondent had been operating the Philadelphia system a few years only. At the time of the election, only 9 of more than 90 unit employees had seniority dates earlier than 1987. Circumstances have changed in 5 years. The emphasis has gone from construction installation and initiation of service to that of maintenance of an established system. The General Counsel cites the job history of unit employees as evidenced by the documentary evidence as demonstrating that Respondent now provides not merely jobs but "careers," i.e., unit employees have been promoted and transferred either between positions or between locations. The General Counsel cites also the fact that only 7 of the current 50 unit employees have been hired since 1993. The General Counsel concludes that the unit employees have made a commitment to their employment with Respondent and can readily see the benefits of tenure. Thus the General Counsel argues that an absence of a history of unit employee layoffs enhances the lingering coercive effects of the seven January–February 1991 unlawful layoffs.

The Respondent cites the testimony of the current manager, Adderly, as to the practice as is effectuated under his management with respect to the manner of layoff notification. He testified that there is no public announcement made as to the reason for an employee's termination because it is a matter kept confidential between the employee and the supervisor. Thus Respondent argues that the only phenomenon visible to remaining employees is the large turnover, and not whether it was voluntary or not. Respondent is relying on the practice as it is known

to a most recent manager whose testimony, however, was not rebutted. Furthermore, the six February 1990 terminations were effectuated ceremoniously by the escorting of the discriminatees out of the plant by armed guards. That procedure probably does not occur with voluntary or other involuntary terminations, but the record is not entirely clear. Respondent, however, argues that the large turnover in the system as a whole and in the unit dissipates the effect of the seven unlawful layoffs. Further, it argues that the terminations, despite the armed guard escort, were benign because the discriminatees were not discharged with a "blot on their employment record," i.e., they were ostensibly laid off for economic reasons, albeit pretextual economic reasons. Respondent further alludes to its subsequent "benign" treatment of open union organizers who were rewarded by promotions and its "benign" treatment of General Counsel witnesses. Of those witnesses, two were promoted (Heath and Glover), three are still employed in the unit (Evans, Jett, and Defabis), and three have voluntarily terminated (Sweeney, Mitchell, and Takach). As noted above, Judge Evans concluded that Respondent was motivated by a desire to manipulate an expected second election and not necessarily by a desire for retaliatory punishment with respect to the six installation technicians.

II. ANALYSIS

A. Guiding Precedent

The Board has traditionally held that evidence of employee turnover is irrelevant to the determination of *Gissel* bargaining orders. *Highland Plastics*, 256 NLRB 146, 147 (1981). In so doing, the Board was concerned with the lingering effects of serious unfair labor practices which made the likelihood of a free, uncoerced election remote. The Board was also concerned with a concept of justice that the perpetrator of wrongdoing ought not profit by the delay inherent in the administrative remedial process. *Highland Plastics*, supra. The Board has continued to adhere to those principles, particularly often noting that even if it were to consider turnover, it would require bargaining orders where numerous "hallmark" violations of threats of discharge were committed by and, explicitly or implicitly, sanctioned by the highest officials of the employer whose continuation in their authoritative positions would likely exert a coercive effect upon unit employees. *International Door*, 303 NLRB 582, 583 (1991); *HarperCollins Publishers*, 317 NLRB 168 (1995); *Be-Lo Stores* 318 NLRB 1 (1995).

The United States Court of Appeals for the District of Columbia has been receptive to the issuance of Board requested *Gissel*-type bargaining orders where the Board has particularized its reasons for including that traditional remedies could not dissipate the lingering coercion, especially where here the employer did not raise the issue of employee turnover, *Davis Supermarkets v. NLRB*, supra. Where a respondent-employer has raised the issue of employer turnover, that court has insisted that the Board evaluate such evidence and conditions in the bargaining unit up to the time the Board renders its decision on remand. *Avercor, Inc. v. NLRB*, supra. The court has instructed the Board that it is the Board's responsibility to demonstrate the basis for its conclusions that the extraordinary bargaining order remedy must subordinate the right of subsequent new employees to a free choice of representation or nonrepresentation. *Avecor, Inc. v. NLRB*, supra; *Somerset Welding & Steel v. NLRB*, supra.

The Board accepted the court's remand in the *Avecor* and *Somerset* cases and withdrew its bargaining order remedy request. It did so not in consideration of employee turnover, but because of other factors such as the reconsideration of whether the unfair labor practice determination, especially upon review by the court, called for the extraordinary remedy.

As I view Board and court precedent, I conclude that in this remand proceeding, the Respondent had the burden of moving forward with evidence of changed circumstances in the bargaining unit but, thereafter, the General Counsel had the burden of adducing rebuttal evidence or argument to demonstrate why traditional remedies could not effectively dissipate the lingering effects of the unfair labor practices found herein by the Board and court, notwithstanding those changed circumstances.

The Respondent in its posttrial brief requested administrative or judicial notice be taken of its compliance with the balance of the court order, as well as the virtual absence of other unfair labor practice determinations. Such evidence is, of course, relevant to the issue of potential probable recidivism. I conclude that it is the General Counsel's burden to adduce evidence of recidivism as part of his burden to demonstrate that the change in circumstances evidenced by employee/supervisory turnover or other changed circumstances is unlikely to impact upon the alleged lingering coercion. Neither the General Counsel nor the Charging Party adduced any evidence of recidivism of any kind[4] nor any evidence or argument of noncompliance by Respondent with the court's order, which the General Counsel essentially concedes in his brief. It is sufficient for me to find that no evidence of recidivism of any kind nor evidence of any noncompliance has been adduced. I find it therefore unnecessary to take notice of the specific status of the compliance proceeding nor to make any research as to whether there are any prior Board determinations of other Respondent unfair labor practices. If any of the latter existed, the General Counsel undoubtedly would have cited such by way of requested judicial notice; e.g., *Heatilator Fireplace*, 249 NLRB 544, 546 fn. 6 (1980), enfd. 646 F.2d 1218 (6th Cir. 1981). Accordingly, it is unnecessary to rule on the General Counsel's posttrial motion to strike portions of Respondent's brief and Respondent's opposition motion.

The Board, in its remand order, cited Impact Industries, supra, as the guiding precedent for my evaluations, surely implicitly, in addition to the factors set forth by the remanding court herein as discussed in the *Avecor* and *Somerset* cases. The *Impact Industries v. NLRB*, 847 F.2d. 379 (7th Cir. 1988) case involved a disposition by the Board of a remand order of a *Gissel*-type bargaining order request by the United States Court of Appeals, Seventh Circuit. Presumably relevant is also the Board's disposition of a similar remand from the Seventh Circuit in *Montgomery Ward & Co*., 307 NLRB 764 (1992), wherein the Board accepted the remand of the court in *Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156 (7th Cir. 1990). In both *Impact Industries* and *Montgomery Ward*, the Board withdrew its consideration of a bargaining order because of changes in unit circumstances, i.e., employee and managerial/supervisory turnover. In *Impact Industries*, the Board cited the death of the original co-owners; high level managerial/supervisory turnover (only two perpetrators remaining); an

[4] Documents, which were the subject of the petition to revoke the Charging Party's subpoena duces tecum, did not relate to any alleged unfair labor practice conduct nor to the subject of recidivism.

increase of the unit from 135 before the election to 263, resulting in 90 percent of current employees unexposed to coercion; passage of time of about 8 years from election to remand decision; and under the court's law of the case, it found the prospect of a fair election a "likely event" and the impact of unfair labor practices mitigated and "likely to be erased" by traditional remedies. In *Montgomery Ward & Co*., supra, the Board, in its remand decision, adopted the similar recommendation of the administrative law judge. The judge found that after 8 years, of 13 supervisor perpetrators, only 1 remained; that 270 original voter-eligible unit employees were reduced to 154, of whom 41 were also members of the bargaining unit at the time of unlawful conduct. The judge further noted that there was absence of any evidence which attributed administrative delay to the employer or evidence that the employer unlawfully caused the turnover. Accordingly, he concluded that:

> [A]ny benefit the Respondent may gain from its unlawful conduct must be weighed against the consequences of imposing a remedy that now infringes on the self determination rights of the vast majority of the current work force, the composition of which has dramatically changed during the course of the passage of time. [*Montgomery Ward & Co*. supra, at 766.]

In *Avecor v. NLRB*, supra, the court found it to be relevant that the unit had "changed considerably as a result of growth and turnover," whereby only half of the unit employees had been employed on the date of the election. In *Somerset Welding & Steel v. NLRB*, supra, the court found relevant evidence of management and employee turnover and the fact that fewer than 10 percent of unit employees were exposed to coercive statements by supervisors. The court observed:

> The Board concluded that employee turnover occurring since the election was insufficient to affect the appropriateness of the bargaining order because 50 of the current 64 employees, or 78 percent, worked at the Company at the time of the election. We do not know, however, how many of the 50 employees signed the cards authorizing an election. Furthermore, two of the supervisors accused of making coercive threats, Clyde and Berkley, no longer serve as supervisors. These changed conditions warrant close examination of the bargaining order to determine if it is required. [*Somerset Welding & Steel v. NLRB*, 987 F.2d 777, at 781.]

B. Contention of the Parties

The General Counsel, whose position and argument subsume that of the Charging Party, contends that despite the passage of 5 years' time that it is "inconceivable that the experience of the campaign and the unfair labor practices have been forgotten." He cites the fact that somewhat less than half of the unit was exposed to it and more than half was employed in the Philadelphia department at the time of the unlawful February layoffs (less than half in unit positions at that time), that 17 of the current 50 employees signed union authorizations and that 9 received subpoenas to testify before Judge Evans.

The Respondent notes that the court in the *Avecor* and *Somerset* remand orders dealt with turnover rates of 50 percent or less. Respondent stresses that a minority (44 percent) of current employees witnessed the May 1990 wage adjustment; that only 23 or 46 percent of current unit employees were employed in unit positions at the February 1990 layoffs; and that 27 or 54 percent of current unit employees entered unit employment after the election. Respondent argues that a "significant majority" of current unit employees never had an opportunity to express their choice regarding representation and only 17 or 34 percent of the current unit employees signed union representation authorizations 5 years ago.

With respect to supervisory turnover, the General Counsel concedes the large turnover of supervisors, particularly those responsible for the unlawful interrogations which I noted above, involved for the most part one-on-one confrontations including known union supporters, which the Board did not rely on. However, the General Counsel cites the continued employment of Area Engineering Director John Donahue in the promoted capacity of regional vice president of engineering. Donahue was involved in one union button prohibition episode as well as the underlying determination to lay off seven employees. The General Counsel also cites the continued employment of Paul Gillert as vice president of human resources, who gave a campaign speech 3 days before the election (not alleged as coercive); Labor Consultant and now Cable Division Human Resources Director Al Peddrick; Al Calhoun, then a special products coordinator since promoted to regional special projects coordinator; and finally Mike Doyle, the then and now regional vice president. Doyle, Gillert, and Calhoun all were related in varying degrees to the unlawful wage adjustment and similarly, in varying degrees, Gillert and Doyle were related to the discriminatory layoff decisions. The General Counsel stresses that two of the culpable managers were promoted, and continued presence of the others "is unlikely to alter the perception that the same actors harboring the same animus are in control."

Peddrick, of course, was not alleged to have committed or participated in any unlawful conduct. Indeed, Judge Evans concluded that much of the supervisor-to-individual unlawful confrontations were due to a failure, due in part to misunderstanding, by line level supervisors to adhere to instruction to refrain from unlawful threats, promises, and interrogations. Not only did Judge Evans fail to conclude that lower level supervisors were encouraged by higher managers to coerce unit employees, he suggested that it was contrary to higher management instruction.

The Respondent stresses that the local management now consists of a virtually new team who have little daily, ongoing contract with Doyle, Gillert, or Peddrick. Donahue's promotion reduced his visibility to and connection with ongoing unit business activity.

As noted above, the actual victims of interrogations and unlawful promises constitute only a small fraction of current unit employment.

With respect to the lingering impact, if any, of the unlawful preelection 1990 wage adjustment, the General Counsel argues that the absence of any comparable size adjustment throws the past unlawful raise into bold relief as a continuing reminder of the 1990 vote-buying scheme and will likely be the "subject of discussion" and voter "speculation" as to whether "history will repeat itself" in a second election.

Respondent argues that the history of only moderate subsequent ongoing pay adjustments and regular merit raises ameliorates not enhances, the significance of and coercive effect of the 1990 wage adjustment, particularly in view of the limited percentage of "victims" in the 1990 incident and the cumulative

impact of their total subsequent raises which have lifted their current wages by 50 percent or more.

The problem of General Counsel's argument is that it premises the 1990 wage adjustment as a vote-buying scheme whereby employees are impliedly promised future high wage adjustments without need for union representation. By virtue of the absence of subsequent large wage adjustments and the Respondent's retreat to moderate pre-1990 raise averages, the 1990 coercive message necessarily is exposed for what General Counsel suggests it was, i.e., a one time vote-buying scheme. Therefore, it can equally be argued that the employees who received such raises must see the 1990 implied promise as a bitterly hollow one and conclude that such preelection implied promises are of dubious worth. The vote-buying scheme can thus be viewed as having ultimately adversely affected Respondent's antiunion strategy, and not necessarily a cause of lingering discouragement of union representation. Clearly, an unlawful postelection reward for the defeat of the Union would arguably have had a more lingering effect, as the General Counsel argues, employees would speculate about history being repeated, whereas speculation about a preelection bribe will have no effect except one adverse to Respondent unless another bribe is actually given before the election.

The General Counsel also argues that the postelection discharge of union supporters has grown in significance because of the subsequent lack of unit layoffs and the apparent Respondent policy of assuring employees of employment within its system in preference to layoffs. The General Counsel argues that offers of reinstatement and backpay payments pursuant to court order "more than 4 years after the fact can hardly be reassuring to an employee interested in protecting a career." He asks, "Given these facts how likely is it that unit employees will risk open organizing or support in a second election campaign."

The Respondent contends that the General Counsel is basing his assumptions upon unproven employee perceptions of turnover. Respondent points out that there is no evidence to support an inference that employees are aware of the circumstance of employment termination of other employees voluntary or involuntary but, rather, that testimonial evidence indicates that they are not. Respondent argues that the only visible phenomenon to be witnessed by employees is that there has been a very large turnover in employment. Respondent also refers to the "benign" nature of the layoffs discussed above, the benign treatment of other union supporters and the lack of evidence of any retaliatory actions since then, as well as the absence of any evidence of recidivism by Respondent as a whole or by Doyle, Calhoun, and Gillert in the unit or elsewhere thereafter.

C. Conclusions—Bargaining Order

Clearly, under Board precedent which is concerned, in large part, with the concept of the demands of simple justice that a wrongdoer not profit by administrative delay, the General Counsel has the best of the argument. However, by virtue of court precedent, under *Impact*, *Avecor*, and *Somerset*, the Board must give greater concern to the infringement of the representational rights of subsequent unit majority newcomers than to the interest of justice and/or labor relations stability under the Act as perceived by the *Gissel* decision unless it is demonstrably clear that an uncoerced election cannot be held. It is true that the passage of time and percentages of employee/super-visory turnover is not as great herein as in the *Impact Industries*, supra, or *Montgomery Ward & Co.,* cases. Nonetheless, 5 years have already passed, and yet a final disposition remains. I conclude that under court precedent and rationale, the scale tips in favor of the new unit employees' right to a choice of representation or not. The confrontational, coercive unfair labor practices have been dissipated by departure of victims and perpetrators alike. High echelon managers directly active in the pay adjustments and layoff decisions are now gone, notably the vice president of Philadelphia area operations, Tyrone Connor. Others were placed in positions more remote from the unit, albeit in part by promotion. A new local management team is in place. I find that the passage of time, the diluted impact of the 1990 pay raise coercion, the lack of evidence of probable or actual recidivism by Respondent and specifically by the remaining agents involved, the large turnover of unit employees, supervisors, victims of coercion, and pay raise beneficiaries have clouded the possible employee perception of a lingering coercion effect to an extent sufficiently to conclude that the Board's traditional remedies are likely adequate to dissipate that effect. Under these facts, I conclude that the self-determination rights of the new unit employees who form a significant majority should therefore be given deference and that a fair election can likely be held.

ALTERNATIVE REMEDY

By virtue of my foregoing conclusion, I find the Union request for extraordinary remedies, including special preelection access, to be untenable. By virtue of finding that the coercive effects of the 1990 unfair labor practices have been so dispelled as to enable a fair free election to be held, such additional remedies represented by the Union are unwarranted. *Impact Industries*, supra, fn. 6; *Montgomery Ward & Co*., supra at page 766.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

That the paragraphs in the Board's Order requiring the Respondent Comcast Cablevision of Philadelphia, L.P., bargain with Teamsters Union, Local No. 115, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, be deleted.

That Case 4–RC–17321 be reopened and the Regional Director conduct a second election thereunder and, further, that the Notice of Second Election include language informing employees that the first election was set aside because the Board found certain conduct by the Respondent interfered with the employees' free choice.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.